

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**SECOND APPEAL No. 36 of 1985****For Approval and Signature:****HONOURABLE MR. JUSTICE R.S.GARG**

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1 Whether Reporters of Local Papers may be allowed
to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy
of the judgment ?

4 Whether this case involves a substantial question
of law as to the interpretation of the
constitution of India, 1950 or any order made
thereunder ?

5 Whether it is to be circulated to the civil judge
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KEDARMAL LALCHAND - Appellant(s)**Versus****SHANKARLAL MOHANLAL - Defendant(s)**

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Appearance :

MS VERSHA BRAHMBHATT FOR FOR MS VASUBEN P SHAH for Appellant(s) : 1,
1.2.1, 1.2.2, 1.2.3, 1.2.4, 1.2.5, 1.2.6,1.2.7

NOTICE SERVED for Defendant(s) : 1,

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CORAM : HONOURABLE MR. JUSTICE R.S.GARG**Date : 04/10/2006****ORAL JUDGMENT**

1. Ms.Varsha Brahmbhatt, learned counsel for the
appellants. None for the respondent though served.

2. The dissatisfied plaintiffs have filed the present

Second Appeal against the judgement and decree dtd.12/8/1993 passed in Regular Civil Appeal No.81 of 1975 by the learned District Judge, Banaskantha at Palanpur confirming the judgement and decree dtd.29/7/1975 passed in Regular Civil Suit No.6 of 1974 by the learned Joint Civil Judge (JD), Palanpur whereunder the suit was partly dismissed.

3. Short facts of the case are that the plaintiff - Lalchand Fulchand came to the Court submitting inter-alia that some property was purchased by his father Fulchand and thereafter some property adjacent / adjoining to the same was purchased by the plaintiff Lalchand Fulchand. After demolishing both the constructions, a new house was constructed. The new house had two roads which were on West and South of the property. The plaintiff submitted that he had right to ply his vehicle on the public lane to the South and West of his property, West lane is very narrow and the plaintiff was not able to park his truck or vehicle on that side, if the obstacle is placed on the road. It was also contended that the respondent Defendant started making a Pakka Cabin admeasuring 6 ft. X 6 ft. towards South West corner of the property on the road without permission of the Panchayat and as it was to create a traffic nuisance and obstructions in the

right of the plaintiff's peaceful enjoyment, prohibitory injunction restraining the respondent from making any further construction be issued and a mandatory injunction directing demolition of the construction already raised on the road / street was requirement.

4. The defendant appeared in the Court and submitted that he had raised a wooden Cabin of the same size somewhere in the year 1957 and at least 15 days before filing of the suit, he had made Pakka construction. He also submitted that the plaintiff has illegally opened a door on the Western side of his house and as the plaintiff has not approached the Court within reasonable time and with clean hands, he was not entitled to any judgement in his favour.

5. The learned trial judge after recording evidence and hearing the parties, decreed th suit in part, issued prohibitory injunction against the defendant restraining him from making any further construction but refused relief of mandatory injunction observing that the plaintiff has approached the Court with a great delay.

6. Being aggrieved by the said judgement and part dismissal of the suit, the plaintiff preferred Regular Civil Appeal. After service of the notice, the defendant appeared in the Court and at the time of hearing, he wanted to submit that the judgement even to the extent of grant of prohibitory injunction was wrong and that part of the decree deserved to be set aside. After hearing the parties, the learned first appellate court observed that the defendant would not be allowed to challenge the judgement passed by the trial court, as he had not filed any cross-objection, but the appellate court despite holding that the defendant had made some construction over the public road, refused the relief of the mandatory injunction. The plaintiff being aggrieved by the said judgement and decree, is before this Court.

7. The appeal has been admitted for hearing the parties on 29/3/1985 on the following substantial questions of law;

(i) Whether the lower appellate court has materially erred in law in not granting mandatory injunction for the removal of the cabin admittedly put up by the defendants unauthorisedly on the public road?

(ii) Whether the lower appellate court has exercised its discretion discretion in refusing to grant mandatory injunction on correct legal principles?

8. Ms.Versha Brahmbhatt, learned counsel for the appellant in the very opening submitted that the appellant No.1 - Kedarmal Lalchand has expired somewhere in the year 1999 but the appeal would not abate because Kedarmal Lalchand was brought on record as a legal representative of deceased Lalchand Fulchand - original plaintiff. She submits that that as the property and the estate is duly represented by the other representatives of deceased Lalchand Fulchand - original plaintiff, there would be no question of abatement. I will accept the said argument.

9. So far as the merits of the matter are concerned, Ms.Brahmbhatt, learned counsel for the appellants placing her reliance upon a Single bench Judgement of this Court in the matter of Prabhudas Kalyan Vs. Haji Hasan Haji Yusuf, reported in 1983 (1) GLR 792 submits that in a case of encroachment upon the public lane, road or street, question of limitation

would not come nor delay would defeat the justice, because existence of such encroachment on the public road would be continuing cause of action. She also submits that the two courts have concurrently found that the defendant has made encroachment upon the public road, and if the said findings are not challenged by anybody, then the refusal of the grant of mandatory injunction would mean that anybody can make encroachment upon the public lane or road. She submits that the present is a case where such relief of mandatory injunction ought to have been granted in favour of the appellants.

10. It is trite law that public lane, public street, public road or public thoroughfare are the public property, they do not belong to any individual. A member of the public cannot acquire rights by adverse possession against his ownself. Even otherwise, when the particular property is dedicated for public use, then the public at large and public in common would be entitled to have the use of the property. Single person or a group of person or a society through its members or of such persons would be entitled to bring an action before the competent court of law for removal of such obstruction which has been created on the public street etc. In the present case, undisputedly the plaintiff has approached the Court after a

long time, but that would not create any right in favour of the defendant who had made encroachment upon the public road. Non grant of the relief of mandatory injunction would virtually add premium upon wrong act of the defendant.

11. If such a mandatory injunction is not allowed, then any public body, Panchayat, Municipality, Municipal Corporation or State on one hand may not take action against such trespasser or wrongdoer and at the same time, the member of the public who has a right, would not be allowed to maintain the suit. This would lead to a chaotic situation and lead to anarchism. In the opinion of this Court, a mandatory injunction as prayed for by the plaintiff ought to have been issued by the two courts below.

12. The trial court and the appellate court though held that the encroachment is on the public lane / street, went wrong in refusing the relief of mandatory injunction. The question on which the appeal has been admitted deserves to be decided in favour of the appellants. Those are accordingly decided and it is held that the court below committed material irregularity rather illegality in exercise of their jurisdiction in

not granting the mandatory injunction for the removal of the Cabin which was admittedly made by the defendant unauthorisedly on the public road. The judgement and decree passed by the two courts below to the extent of refusing mandatory injunction are set aside. It is hereby directed that if within a period of three months from today the defendant does not remove the said construction, then the appellants would be entitled to put this order in execution and request the trial court / executing court for removal of the said obstruction. The appeal is allowed. Let a decree be framed accordingly.

(R. S. GARG, J.)

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